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No. 91-667

In the Supreme Court of the United States

OCTOBER TERM, 1991

GULF COAST HELICOPTERS, INC., EDWARD ACUNA SR., AND MARGARET ACUNA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that there was no genuine issue of material fact regarding the construction of a promissory note.

2. Whether the district court was biased against petitioners.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A6) is not reported, but the decision is noted at 935 F.2d 1290 (Table). The decision of the district court, which was delivered orally from the bench (Pet. App. A46-A53, A61-A67), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1991. A petition for rehearing was denied on July 22, 1991 (Pet. App. A7). The petition for a writ of certiorari was filed on October 21, 1991 (a Monday). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 1980, petitioner Edward Acuna, the president of petitioner Gulf Coast Helicopters, Inc., executed a promissory note in favor of Bay Area Bank & Trust. Pet. App. A14-A15. Acuna and his wife, petitioner Margaret Acuna, guaranteed payment of the note. *Id.* at A3. The Small Business Administration also guaranteed payment of 90% of the note. *Ibid.*

The principal due on the note was $150,000. The note fixed the initial interest rate at 12.5%, but provided that, "upon the expiration of a full calendar quarter * * *, the rate of interest * * * shall increase or decrease each calendar quarter" to a rate 2¼% above the prime rate. Pet. App. A14. The note required the bank to "give written notice to SBA and [petitioners] of each increase or decrease in the interest rate within ten days after the effective date of the change." *Ibid.* Petitioners were to pay monthly installments of $2,730, but the bank was given "the right to raise or lower the monthly payment to assure such payment will amortize the Note within the bounds of the stated maturity." *Ibid.* "[A]ll principal and interest not sooner paid" became "due and payable seven (7) years" from the date of the note. *Ibid.*

From September 1980 through August 1987, the bank sent Gulf Coast monthly notices seeking payment of principal and interest. Pet. App. A3. Each notice called for payment of $2,730 and also set forth the balance due on the note and the interest rate in effect. *Ibid.*; see, *e.g.*, *id.* at A32. With one exception, the bank did not send separate notices of quarterly changes in the interest rate on the note. Gulf

Coast made the payments requested by the monthly notices. *Id.* at A3.

Because of fluctuations in the prime rate during the term of the note, there was an outstanding balance af $37,081 at the end of the note's seven-year term. Gulf Coast and the Acunas refused to pay that amount, and the SBA filed an action in federal district court to recover the balance due on the note. Pet. App. A3-A4. The district court granted summary judgment in favor of the SBA.

2. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A6. The court held that although the bank had not sent notices of quarterly changes in the interest rate on the note, the monthly statements the bank sent to petitioners afforded "adequate notice of interest rate changes." *Id.* at A4. In addition, the court continued, the failure to provide quarterly notices did not "relieve [petitioners] of their obligations under the note," since notice of a change in the interest rate was "not a condition precedent to their obligation to pay the note." *Id.* at A4-A5. Applying Texas law, the court concluded that "[t]he note in issue contains no conditional language or in any way limits the responsibility of the borrower to perform its payment obligations. The terms of the note are clear, and there is no fact issue to be resolved by extrinsic evidence." *Id.* at A5. Finally, the court found that the note imposed no duty on the bank to modify the amount of the monthly installment in order to assure that the note would be fully amortized at the end of the seven-year term. *Ibid.*

The court of appeals also rejected petitioners' contention that they had been denied their rights to due process and to a jury trial. Pet. App. A6. Petitioners

"were afforded an opportunity to be heard," the court of appeals explained, because the district court "considered their summary judgment motion and response to SBA's motion for summary judgment." *Ibid.* The court of appeals added that the right to a jury does not prevent a court from granting summary judgment when there are no facts in issue. *Ibid.*

ARGUMENT

1. In sustaining the grant of summary judgment in favor of the SBA, the court of appeals applied black-letter principles of Texas contract law to the terms of the note at issue. Petitioners' contention that the note was ambiguous and should not have been construed without reference to extrinsic evidence presents no question calling for this Court's attention.

The terms of the note fully justify the lower courts' disposition of this case. On its face, the note unambiguously provided that the interest rate "shall increase or decrease each calendar quarter" to track the prime rate. Pet. App. A14. Nothing in the note suggested that petitioners' obligation to pay interest was contingent upon receipt of notice of the revised rate or that the bank was obligated to adjust its monthly billings to assure that the principal would be fully paid at the end of the note's seven-year term. To the contrary, the terms of the note fixing the interest rate were unconditional, stating categorically that the rate "shall increase or decrease each calendar quarter"; the note specified that the bank had "the right," not the duty, "to raise or lower the monthly payment to assure such payment will amortize the Note within the bounds of the stated maturity"; and the note provided "that all principal and interest not

sooner paid shall become due and payable seven (7) years" from the date of the note. *Ibid.*

Even if petitioners' obligations had been contingent on due notice of any change in the interest rate, there was no material breach of that condition. The notices that petitioners received each month advised them of the interest rate then in effect and the outstanding balance on the note. These notices were sufficient to advise petitioners of the current interest rate on the note and to preclude any misimpression that the last $2730 payment would discharge the note.

Petitioners highlight the fact that the SBA indicated, in response to a request for admission, that the note "was intended or required by the SBA to be fully amortized during its seven-year term." Pet. 22; see Pet. App. A20. However, at most, this admission indicates that the SBA was relying on the bank to modify the monthly payments so as to discharge the balance of the note by the end of its term. The admission does not justify any departure from the unambiguous provisions of the note itself.

2. Petitioners also contend that they were denied due process. In their view, the district judge "did not give [them] a fair opportunity to be heard on the allegations at issue," because he "had his mind made up from the beginning." Pet. 29. Petitioners fail to identify anything in the record suggesting that the district court entertained any extrajudicial bias; the remarks quoted in the petition reflect only a conscientious effort to apply applicable legal principles to the facts of record. Petitioners' insinuation that the court was prejudiced against Mr. and Mrs. Acuna because they are Hispanic (see Pet. 1, 31, 39) is entirely groundless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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